1879

Affirmed
11-87

Field
Jan. 15. 1880
Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1097.

THE TOWNSHIP OF EMPIRE, PLAINTIFF IN ERROR,

vs.

SMEDLEY DARLINGTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 18, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 1097.

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vs.

SMEDLEY DARLINGTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, judge of the district court of said district, and in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit pro tempore, sole judge of said circuit court, on Wednesday the 17th day of September, at the June term of said court, in the year of our Lord eighteen hundred and seventy-nine, and of our Independence the one hundred and fourth year.

J. A. JONES, *Clerk.*

SMEDLEY DARLINGTON
vs.
THE TOWNSHIP OF EMPIRE. } No. 5389. In assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Smedley Darlington, who is a citizen and resident of the State of Pennsylvania, puts in his place Messrs. Scholes and Mather, his attorneys, against the township of Empire, a corporation organized under the laws of the State of Illinois, and a citizen of the said southern district thereof, defendant of a plea of trespass on the case upon
2 promises, which puts in its place Messrs. Tipton and Pollock, its attorneys.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 18th day of May, in the year of our Lord eighteen hundred and seventy-eight, came said plaintiff, by his attorneys, and filed in the office of the clerk of said court his bond for costs in said cause, which is in the words and figures following, to wit:

Bond for costs.

Circuit court United States of America, southern district of Illinois.
June term, A. D. 1878, ss:

SMEDLEY DARLINGTON
vs.
THE TOWNSHIP OF EMPIRE.

In assumpsit. Damages, $6,000.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States. Dated this 18 day of May, 1878.

SCHOLES & MATHER.

(Endorsed:) Filed May 18, A. D. 1878. J. A. Jones, clerk.

3 And afterwards, to wit, on said 18th day of May, in the year aforesaid, there was issued out of said clerk's office a summons in said cause, directed to the marshal of the southern district of Illinois to execute, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss.

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you to summon the township of Empire, if to be found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of June next, to answer unto Smedley Darlington of a plea of assumpsit, to his damage as he alleges of six thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Su-
4 preme Court of the United States of America, at Springfield aforesaid, this eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and second year.

[L. S.] J. A. JONES, *Clerk.*

Return of marshal.

Executed this writ on the 28 day of May, 1878, by delivering a true copy thereof to Hiram Buck as supervisor of the within named township of Empire.

E. R. ROE, *U. S. Mar.*,
By JAMES GOODHEART, *Deputy.*

(Endorsed:) Filed June 1, A. D. 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 24th day of May, in the year aforesaid, came said plaintiff by his attorneys, and filed in said clerk's office his declaration in said cause, as follows, to wit:

Declaration.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In circuit court, June term, A. D. 1878.

Smedley Darlington, who is a citizen of the State of Pennsylva-
5 nia, plaintiff, by Scholes & Mather his att'ys, complains of the township of Empire, a body corporate and politic, organized and existing under the laws of the State of Illinois, and a citizen of said State and located in said district, the defendant, of a plea of trespass on the case on promises, for that whereas heretofore, to wit, on the twentieth day of March, A. D. 1870, at, to wit, said district, defendant made, executed, and delivered its one hundred certain interest coupons in writing for fifty dollars, each, signed by its supervisor James Bishop, and by its clerk D. C. Clark, whereby, in and by each of said coupons, defendant promised and ordered that the treasurer of McLean County, Illinois, would pay bearer on the maturity thereof respectively the sum of fifty dollars.

And plaintiff avers that he did thereafter, on, to wit, the first day of

March, 1875, at, to wit, said district, become the purchaser, owner, and bearer, for value, and without notice of any defence, of said coupons, whereby defendant became liable to pay plaintiff said coupons when due, and being so liable defendant did, then and there, to wit, the date last aforesaid, at, to wit, said district, promise plaintiff to pay him said sums in said coupons mentioned when due.

6 And plaintiff avers that although said coupons are long past due, and demand has been made upon said treasurer for payment thereof, he the said treasurer has refused and neglected to pay the same, and the defendant has refused and neglected to pay the same, although payment has been often demanded of it since the maturity of said coupons. To plaintiff's damage six thousand dollars, wherefore he brings suit by his att'ys Scholes & Mather.

Copy of instrument sued on.

$50.] EMPIRE TOWNSHIP RAILROAD BOND. [No. 21

Interest warrant.

Treasurer of McLean County, pay to bearer March 20th, 1876, fifty dollars, being one year's interest on bond numbered as above.

JAS. BISHOP, *Supervisor.*
D. C. CLARK, *Clerk.*

The defendant will take notice that plaintiff will rely solely on said 100 coupons in evidence in this case and that they are all of like tenor and effect as the above copy except as to No. of bond referred to on their face to which they respectively belong, & the no's of the bonds to which said coupons belong, are $\frac{21}{30}$ & $\frac{31}{40}$ & $\frac{41}{50}$ inclusive, forty of said coupons belonging to bonds $\frac{21}{30}$.

SCHOLES & MATHER, *Att'ys for Pl'ff.*

7 (Endorsed:) Filed May 24, 1878. J. A. Jones, clerk.

And, afterwards, to wit, on the 9th day of December, in the year last aforesaid, came said defendant by its attorneys, and filed in said clerk's office its plea and notice in said cause, as follows, to wit:

Plea and notice.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In circuit court, January term, 1879.

SMEDLEY DARLINGTON
vs.
TOWNSHIP OF EMPIRE. } Assumpsit.

And the defendant, by Tipton & Pollock, its attorneys, comes and defends the wrong and injury, when, &c., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it, and of this it puts itself upon the country.

TIPTON & POLLOCK,
Def'ts' Att'ys.

Notice.

The plaintiff will take notice that the defendant will prove and rely on as a defense as follows, to wit:

8 1st. Want of power on the part of defendant to issue bonds or coupons sued on.

2nd. That the power conferred on the defendant by the charter of the D. U. B. & P. R. R. Co., had been exhausted by a previous vote & issue of $50,000 in bonds of said charter.

3rd. That the vote and issue of the bonds & coupons in suit was to the I. B. & W. R. R. Co., the defendant having no power or authority of law for voting or issuing bonds or coupons to the said I. B. & W. R. R.

TIPTON & POLLOCK,
Def't's Att'ys.

(Endorsed:) Filed Dec. 9, 1878. J. A. Jones, clerk.

And afterwards, to wit, on Saturday, the 8th day of March, at the January term of said court, in the year of our Lord eighteen hundred and seventy-nine, the following proceedings were had in said court and entered of record in said cause, to wit:

Order, taking under advisement.

SMEDLEY DARLINGTON } *vs.* } Assumpsit.
TOWNSHIP OF EMPIRE. }

9 This day comes as well the plaintiff by Messrs. Scholes and Mather, his attorneys, as the defendant, by Messrs. Tipton & Pollock, its attorneys, and the issue joined by consent is tried by the court, a jury being waived, and the court having heard the evidence and argument, takes the same under advisement.

And afterwards, to wit, on Thursday, the 13th day of March, at the term and in the year last aforesaid, the following further proceedings were had before a full bench in said court and entered of record in said cause, to wit:

1st judg't.

SMEDLEY DARLINGTON } *vs.* } Assumpsit.
TOWNSHIP OF EMPIRE. }

This day come again the parties by their attorneys, and the court being now sufficiently advised in the premises, finds the issue for the plaintiff, and assesses his damages to the sum of five thousand six hundred and twenty-seven dollars.

It is therefore ordered and adjudged by the court, that the plaintiff recover of the defendant the said sum of five thousand six hundred and twenty-seven dollars, his damages aforesaid assessed, together with the sum of dollars and cents, his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

10 And afterwards, to wit, on Tuesday, the 25th day of March, at the term and in the year last aforesaid, came said defendant by

its attorney, and filed in said clerk's office its motion for a rehearing of said cause; which motion and the order of court thereon entered on said day, are in the words and figures following, to wit:

Motion for rehearing.

In circuit court of the United States, southern dist. of Illinois, January term, 1879.

SMEDLEY DARLINGTON
vs.
TOWN. OF EMPIRE.

And now comes the defendant in the above cause and moves the court for a rehearing in the above cause, for the following reasons, to wit:

1st. The finding of the court is contrary to law.

2nd. The law does not authorize a township to vote a subscription to a consolidated road, except in case the act of consolidation expressly authorizes a subscription under that act.

TIPTON & POLLOCK,
Att'ys for Def't.

(Endorsed:) Filed March 25th, A. D. 1879. J. A. Jones, clerk.

11 *Motion new trial.*

SMEDLEY DARLINGTON
vs.
TOWNSHIP OF EMPIRE. Assumpsit.

This day comes the defendant by Messrs. Tipton and Pollock, its attorneys, and enters its motion for a new trial herein.

Be it remembered, also, that on the 16th day of May, in the year of our Lord eighteen hundred and seventy-nine, came said plaintiff by his said attorneys, and filed in said clerk's office his bond for costs in a certain other suit against said defendants, which bond for costs is in the words and figures following, to wit:

Circuit court, United States of America, southern district of Illinois, June term, A. D. 1879, ss:

SMEDLEY DARLINGTON
vs.
THE TOWNSHIP OF EMPIRE. No. 5701.

In assumpsit, damages $3,000.00.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

12 Dated this fifteenth day of May, 1879.

SCHOLES & MATHER.

(Endorsed:) Filed May 16, 1879. J. A. Jones, clerk.

And afterwards, to wit, on said 16th day of May, in the year last aforesaid, there was issued out of said clerk's office a summons in said last-named cause, directed to the marshal of said district to execute which said summons, together with the return of the marshal thereon is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss:

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you to summon the township of Empire, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of June next, to answer unto Smedley Darlington, of a plea of trespass on the case upon promises, to his damage, as he alleges, of three thousand dollars, and have you then and there this writ.

13

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and third year.

[L. S.] J. A. JONES, *Clerk.*

Return of marshal.

Executed the within by reading to and delivering a true copy of this writ to John Kine, supervisor of the within-named township of Empire, this 21st day of May, 1879.

E. R. ROE,
U. S. Marshal,
By WIN. W. IVES,
Deputy U. S. Marshal.

(Endorsed:) Filed June 2d, A. D. 1879. J. A. Jones, clerk.

And afterwards, to wit, on the 23rd day of May, in the year last aforesaid, came said plaintiff by his attorneys, and filed in said clerk's office his declaration in said cause last named, which is in the words and figures following, to wit:

14

Declaration.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In circuit court, June term, A. D. 1879.

Smedley Darlington, a citizen of the State of Pennsylvania, plaintiff, by Scholes & Mather, his attorneys, complains of the township of Empire, a body corporate and politic, organized under the laws of the State of Illinois, and a citizen of said southern district, the defendant; for

that, whereas said defendant heretofore, on, to wit, the first day of May, 1879, at, to wit, said district, was and still is indebted to plaintiff in the sum of three thousand dollars, for money before that time paid, laid out and expended by plaintiff for the use of defendant at its request; and in the sum of three thousand dollars for money before then lent and accommodated by plaintiff to defendant at its request; and in the sum of three thousand dollars for money before then had and received 15, 16 by defendant to use of plaintiff; and in the sum of three (3) thousand dollars, before then due from defendant to plaintiff for interest upon divers large sums of money before then due from defendant to plaintiff, for interest upon divers large sums of money before then due from defendant to plaintiff, and by plaintiff foreborne to defendant for long spaces of time before then elapsed, at the request of defendant;

Whereby defendant became liable to pay plaintiff said several sums of money when requested; and defendant afterwards, on, to wit, the first day of January, 1879, at, to wit, said district, in consideration of the premises, promised to pay said sums of money to plaintiff on request.

And defendant has not, though often requested, paid said sums of money nor any part thereof, to damage of plaintiff three (3) thousand dollars, wherefore he brings suit.

By SCHOLES & MATHER, *Att'ys.*

Copy of instruments sued on.

$50.] EMPIRE TOWNSHIP RAILROAD BOND. [No. 41.

Interest warrant.

Treasurer of McLean County pay to bearer, March 20th, 1879, fifty dollars, being one year's interest on bond numbered as above.

D. C. CLARK, *Clerk.*
JAS. BISHOP, *Supervisor.*

17 ACCOUNT SUED ON.

The town of Empire to Smedley Darlington, *Dr.*

To money	paid, laid out and expended	$3,000
" "	lent and accommodated	$3,000
" "	had and received	$3,000
" "	due for interest	$3,000

(Endorsed:) Filed May 23, 1879. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 3rd day of June, at the June term of said court, in the year of our Lord eighteen hundred and seventy-nine, the following proceedings were had in said court and entered of record in said last named cause, to wit:

Rule to plead.

SMEDLEY DARLINGTON *vs.* TOWNSHIP OF EMPIRE. } Assumpsit.

On motion of plaintiff, by Messrs. Scholes and Mather, his attorneys, the defendant having been regularly served with process, is ruled to plead herein by to-morrow morning.

And afterwards, to wit, on the 4th day of June, in the year last
18 aforesaid, came said defendant by its attorney and filed in said clerk's office its plea in said cause, as follows, to wit:

Plea.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In circuit court, June term, A. D. 1879.

TOWNSHIP OF EMPIRE }
ats.
SMEDLEY DARLINGTON. }

And the defendant, by Tipton and Pollock, its att'ys, comes and defends the wrong and injury, when, &c., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it, and of this it puts itself upon the country.

TIPTON AND POLLOCK,
Def't's Att'ys.

(Endorsed:) Filed June 4, 1879. J. A. Jones, clerk.

And now, afterwards, to wit, on the 16th day of September, at the time and in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

19 *New trial.—Order of consolidation.*

SMEDLEY DARLINGTON }
vs. } 5389. Assumpsit.
TOWNSHIP OF EMPIRE. }

And now on this 16th day of September, 1879, come the parties, by their counsel, and by their consent a new trial is granted herein, and the judgment heretofore entered is set aside and vacated.

And by their further consent it is ordered by the court that this suit be consolidated with the suit between the same parties commenced on May 16th, 1879, and that said suit shall hereafter proceed as one cause.

And then afterwards, to wit, on Wednesday the 17th day of September, at the term and in the year last aforesaid, the following further proceedings were had in said court, and entered of record in said cause as consolidated, to wit:

Judgment.

SMEDLEY DARLINGTON }
vs. } Assumpsit.
TOWNSHIP OF EMPIRE. }

And now, on this 17th day of September, 1879, come again the parties by their counsel, and waive a jury and submit this cause to the court for trial; and the court having heard their proofs and allegations, and being sufficiently advised in the premises, doth find the issue for

20 the plaintiff, and assess his damages to the sum of eight thousand one hundred and seventy-eight dollars and five cents.

It is therefore ordered by the court that the plaintiff recover of the defendant the said sum of eight thousand one hundred and seventy-eight dollars and five cents damages, and his costs herein expended, and that he have execution therefor.

And afterwards, to wit, on Wednesday, the 1st day of October, at the term and in the year last aforesaid, the following further proceedings were had in said court, and entered of record in said cause, to wit:

Order on bill of exceptions.

SMEDLEY DARLINGTON } *vs.* TOWNSHIP OF EMPIRE. } Assumpsit.

And now, on this day, comes the said defendant and tenders its bill of exceptions herein, which is signed, sealed, and ordered by the court to be made a part of the record in this cause. Defendant also tenders its bond herein in the penalty of ten thousand dollars, conditioned as the law directs, which is approved by the court and ordered to be filed.

Whereupon it is stipulated and agreed by the parties that this
21 cause shall be submitted at the present October term of the Supreme Court of the United States in pursuance of the twentieth rule of said court.

Bill of exceptions.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In circuit court. June term, A. D. 1879.

SMEDLEY DARLINGTON } *vs.* THE TOWNSHIP OF EMPIRE. }

Bill of exceptions.

Be it remembered that this cause was tried at this term of the circuit court of the United States for the southern district of Illinois, without the intervention of a jury, a jury being waived by a stipulation of the parties, and be it further remembered that this cause was submitted to the court on the following agreed statement of facts.

In the circuit court of the United States for the southern district of Illinois.

SMEDLEY DARLINGTON } *vs.* THE TOWNSHIP OF EMPIRE. } In assumpsit.

It is hereby agreed and stipulated between the parties to this suit, for the purposes of this case, that the cause may be tried upon the
22 declaration now on file in this court, and the general issue there-

to; and that the following state of facts may be offered in evidence by defendant as though the same were proved by witnesses or record the plaintiff reserving the right to object to any or all of it upon the ground of irrelevancy.

First. That the county of McLean, in the State of Illinois, in the year 1857, adopted the township organization system of said State; and that the township of Empire is one of the townships in said county along the line of said road.

Second. That on the twenty-eighth day of February, 1867, the legislature of Illinois passed an act entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same; that said act was duly published in the private laws of the State of Illinois for the year 1867, in volume two, on pages 758 to 765, inclusive, which said charter is hereby referred to and made a part of this agreement; and in case this cause goes to the Supreme Court of the United States, may be here inserted in full or in part at the option of either party.

23 Third. That under the provisions of the said charter the equal voters of said township of Empire, in due form of law and in accordance with said act, on the twelfth day of June, A. D. 1867, held an election and voted to subscribe for fifty thousand dollars worth of the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company; and that in pursuance of said election, and in accordance with the provisions of said act, the said township of Empire issued and delivered to the said railroad company its bonds in payment of the said subscription of $50,000.00 to the capital stock of said railroad company.

Fourth. That after the issuing of said bonds, to wit, on the twentieth day of August, A. D. 1869, the said Danville, Urbana, Bloomington and Pekin Railroad Company, consolidated with the Indianapolis, Crawfordsville and Danville Railroad Company, at a joint meeting of the directors of said companies held at Urbana, in the State of Illinois, on said 20th day of August 1869; that said consolidated company was named and called the Indianapolis, Bloomington and Western Railway Company, and by that name has ever since been known and called; and that said consolidated company has ever since operated and

24 controlled the lines of the railroads theretofore operated and controlled by the said two companies, except for such time as the property of said consolidated company has been in the hands of a receiver; and that said consolidated railroad forms one continuous line of road from Indianapolis, in the State of Indiana, to the city of Pekin, in the State of Illinois.

Fifth. It is further agreed that, on the first day of September, A. D. 1869, the following petition was filed in the office of the town clerk of the said township of Empire, to wit:

To the clerk of the town of Empire, in the county of McLean and State of Illinois:

We the undersigned citizens and legal voters of said town, do hereby respectfully request, petition you to call an election, in pursuance of law and the requirements of the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, for the purpose of voting for and against subscribing the sum of twenty-five thousand dollars as additional stock in aid of the construction & completion of the Indianapolis,

Bloomington and Western Railroad. The conditions of said vote to be as follows, to wit:

That the said road be completed, and its cars running thereon
25 to the town of Le Roy, by the first day of July, A. D. 1870.

That the depot to be located and established for the township of Le Roy be located within the limits of the present town plat of said town. That the subscription, if authorized by said vote, shall not be made until the foregoing conditions are complied with, but on such compliance that the supervisor subscribe said stock so voted, and issue and deliver bonds upon the credit of said town of Empire, to the amount of such subscription in favor of said Indianapolis, Bloomington and Western Railroad Company; which bonds shall be in sums of one hundred to one thousand dollars each, and to bear interest at the rate of ten per cent. per annum from the date of their issue, and to run a period of not more than twenty years after date thereof at the option of the supervisor of said town of Empire.

David Cheney.	Wm. H. Bartlett.	D. M. Sims.
G. W. Potts.	B. F. Parks.	J. P. Rhulman.
C. W. Hardpence.	C. H. Rutledge.	Rob't Semple.
J. C. Potts.	E. C. Greenman.	Wm. W. Zimmerman.
S. D. Baker.	J. M. White.	T. D. Fisher.
D. T. Crumbaugh.		
26 J. V. Smith.	Y. Bonnett.	M. E. Ferguson.
Talmage Ross.	J. A. Clearwaters.	J. V. Lincoln.
Denton Young.	E. B. Sliers.	J. C. Binney.
J. R. Palmer.	H. C. Dickerson.	

Received and filed September 1st, A. D. 1869.

M. M. DICKERSON,
Town Clerk.

Which was the only petition filed requesting said election for the purpose of subscribing the sum of twenty-five thousand dollars to the capital stock of said Indianapolis, Bloomington and Western Railway Company.

Sixth. It is further agreed that, in pursuance of said petition, the town clerk of said township of Empire issued and posted three notices in said town, in words and figures as follows, to wit:

ELECTION NOTICE.

Whereas, the citizens and legal voters of the town of Empire have in writing filed in my office a statement that a special election is necessary to the interests of said town, setting forth the object of the election; the inhabitants, legal voters of said town of Empire, are therefore hereby notified that a special election will be held at the town
27 clerk's office in said town, on Tuesday, the 12th day of October, A. D. 1869, at 9 o'clock a. m., for the purpose of voting for and against subscribing the sum of twenty-five thousand dollars as additional stock in aid of the construction & completion of the Indianapolis, Bloomington and Western Railroad.

The conditions of said vote to be as follows, to wit: That the said road be completed and the cars running thereon to the town of Leroy by the first day of July, A. D. 1870. That the depot to be located & established for the town of Leroy be located within the limits of the present town plat of said town. That the subscription, if authorized by

said vote, shall not be made until the foregoing conditions are complied with. But on such compliance that the supervisor subscribe said stock so voted and issue and deliver bonds upon the credit of said town of Empire, to the amount of such subscription, in favor of the said Indianapolis, Bloomington & Western Railroad Company; which bonds shall be in sums of one hundred to one thousand dollars each, and to bear interest at the rate of ten per cent. per annum from the date of their issue, and to run a period of not more than twenty years after
28 date thereof, at the option of the supervisor of said town of Empire. Being the objects contained in said statement filed in my office.

Given under my hand at Leroy this 4th day of Sept., A. D. 1869.

M. M. DICKERSON.
Town Clerk.

Which was the only notice of said special election.

Seventh. That in pursuance of said notice a pretended election was held, and resulted in a pretended majority vote in favor of subscribing the sum of $25,000 to the capital stock of the said consolidated railway company; and that the supervisor of said town of Empire, in pursuance of said pretended election, did subscribe for $25,000 in the stock of the said Indianapolis, Bloomington and Western Railway Company; and in payment therefor issued to said consolidated railway company $25,000 additional bonds of the said township of Empire.

Eighth. That the coupons on which this suit is brought are coupons that were attached to the bonds issued by the town of Empire in
29 payment of the said subscription of $25,000 to the capital stock of said Indianapolis, Bloomington and Western Railway Company, the said company being the one formed by the consolidation of the Danville, Urbana, Bloomington and Pekin Railroad Company with the Indianapolis, Crawfordsville and Danville Railroad Company. And it is further agreed that each one of the bonds issued to the Indianapolis, Bloomington and Western Railway Company by the said township of Empire in payment of the said subscription of $25,000 to the capital stock of said railway company, and to part of which the coupons in this suit were attached, contain a recital as follows, to wit:

"This bond is issued under and by virtue of a law of the State of Illinois entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend the powers of and confer a charter on the same, approved February 28th, 1867; and in accordance with the vote of the electors of said township at a special election held (October 12th, 1869), and in accordance with said act, and the faith of the township of Empire is hereby pledged
30 for the payment of the said principal sum and interest as aforesaid."

Ninth. That upon the application of certain tax payers of the said town of Empire, the circuit court of McLean County, Illinois, enjoined, on the 29th day of April, A. D. 1878, the further payment of the principal or interest, or any part of the bonds or coupons issued in payment of the said subscription of $25,000 to the said Indianapolis, Bloomington, and Western Railway Company by said town of Empire, making the bondholders parties by the name of unknown owners and holders & giving them notice under the chancery chapter by publication merely without personal service or notice, & that a final decree has been rendered upon said bill perpetually enjoining the assessment & collection of taxes for purpose of paying said bonds and coupons & de-

claring said bonds & coupons void, said decree rendered some time in fall of 1878.

Tenth. It is further agreed that the said consolidated company issued its bonds to the amount of five million dollars before the said election of the town of Empire held on the 12th day of October, A. D. 1869, and to secure said bonds executed a mortgage upon all the property,
31 both real and personal, then owned by the said company, and including all its rolling stock, franchises, and other property then owned, held or claimed by said company; and that said bonds for which such mortgage was given amount to the entire value of the said road, and that the stock of said railway company at the time of said election held on October 12th, 1869, was and ever since that time has been utterly worthless.

Eleventh. That either party may, if they shall desire to, have this cause certified to the Supreme Court of the United States by the judges of this court, as provided for by the laws of the United States, so that the question as the liability of the defendant in this cause may be determined by the said Supreme Court.

And upon the trial of said cause upon said agreement, and the bonds and coupons offered in evidence, which was all the evidence offered by either party, the court found specially the following facts:

First. That the county of McLean, in the State of Illinois, in the year 1857, adopted the township organization system of said State, and
32 that the township of Empire is one of the townships in said county along the line of said Danville, Urbana, Bloomington, and Pekin Railroad Company, and that the town of Leroy is in said township.

Second. That on the 28th day of February, 1867, the legislature of Illlnois passed an act entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington, and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same." That said act was a private act, and the material provisions thereof relating to this cause are as follows:

An act to amend the articles of association of the Danville, Urbana, Bloomington, and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same.

In force Feb'y 28, 1867.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, That the said corporation is hereby created a body politic and corporate under the name and style of "The Danville, Urbana, Bloomington, and Pekin Railroad Company," with perpetual succession, and under that name and style shall be capable of suing and being sued, pleading and being impleaded, defending and being
33 defended against in law and equity, in all courts and places whatsoever, in like manner and as fully as natural persons, may make and use a common seal and alter and renew the same at pleasure, and by their corporate name and style, shall be capable in law of contracting and being contracted with, shall be and are hereby invested with all the powers and privileges, immunities and franchises, of receiving and disposing of real and personal estate which may be needful to carry into full effect the purposes and objects of this act. And said company is hereby authorized and empowered to locate, construct, and complete a railroad, extending from the city of Pekin, in Tazewell County, Illinois, through, or as near as practicable to the towns of Tremont, Mackinawtown, Con-

cord, Bloomington, Leroy, Mount Pleasant, Mahomet, Champaign City, Urbana, and St. Joseph, to the east boundaries of the State of Illinois. And said company may construct said road with one or more tracks, and shall begin the construction of the same within five years (5) and complete the same within ten years (10) from the passage of this act. Said company shall not have the power to locate or construct a road upon any other route than connecting the above named points by such
34 location as may be deemed best for the interests of said company: Provided, that if any incorporated town or city on the line of said route shall refuse or neglect to subscribe a just and equal amount towards securing the building of said road, then in that case the directors of said company shall have the power, to be exercised in their discretion, so to change the route as not to run said road through the incorporated town or city so refusing or neglecting to subscribe: Provided, that the directors of the division in which such incorporated town or city may be shall have the sole power of determining as to the sufficiency of such subscription: And provided further, that no such power shall be construed to be possessed by the directors when the county or township in which such incorporated town or city may be shall have subscribed, or shall before such change in route is made subscribe to the capital stock of said company a sum not less than one hundred thousand dollars.

§ 2. The capital stock of said company shall be two million dollars, and may, by a vote of the majority of the stockholders according to shares, at any regular or special meeting called for that purpose, be increased to six millions of dollars, to be divided into shares of one hundred dollars each.

35 § 3. The immediate government and direction of said company shall be and is hereby vested in thirteen (13) directors, who shall be chosen by the stockholders of said company in the manner hereinafter provided for, and who shall hold their offices for the period of one year after their election and until their successors shall be elected and qualified, and the said directors, a majority of whom shall constitute a quorum for the transaction of all business, shall elect one of their number president of the company, and shall have power to elect or appoint such other officers as they may deem proper, but no person shall be a director, who shall not at the time of his election be a stockholder, and each stockholder shall, in all elections or votes by stockholders, be entitled to cast one vote for each share of the stock held by him, such vote to be cast either in person or by proxy, and under such regulations as the board of directors may prescribe, and vacancies in the board of directors may be filled by the remaining directors—a two-thirds vote in his favor being required to elect—such appointees to continue in office until the next annual election of directors which said annual election shall be held at such time and place as may be designated by the by-laws of said
36 company, sixty days' printed notice being given by at least five publications in newspapers in Urbana, Bloomington and Pekin.

§ 4. The persons named as commissioners in said articles of association may be removed at any regular meeting of the board of directors and others appointed in their stead, with the same powers. And the said commissioners shall open books of subscription from time to time in each of the cities, incorporated towns and townships along the route of said road, first giving ten days' notice of the time and place thereof, by publication in the newspaper published nearest thereto.

§ 5. The said company shall have power to locate, construct, equip, furnish and maintain and operate a railroad as aforesaid, with all the necessary tracks, side tracks, turnouts, switches, depots, stations, and

all other necessary buildings, structures, and erections; and for this purpose they are hereby vested with all the powers necessary for the purchasing, taking, holding, selling and transferring property, real and personal, the same as natural persons, as the board of directors may deem it necessary to carry out the objects of this act.

37 § 6. For the purpose of acquiring the right of way for the construction and maintenance of said railroad, side tracks, turnouts and grounds for depots, stations, erections and structures, and for the purpose of obtaining stone, gravel and other materials for building, ballasting or repairing said road and of obtaining a right of way to said material, the said company be are hereby authorized and empowered to take, condemn and use the same, under the provisions of an act entitled "An act to amend the law condemning the right of way for purposes of internal improvement," approved June 22, 1852, and all laws that have been or may be hereafter enacted amendatory thereof.

§ 7. Said company shall have power to unite or connect itself with any other railroad company in this State, upon such terms as may be mutually agreed upon between the companies so uniting or connecting, and for that purpose full power is hereby given to said company to make and execute such contracts with any other company as will secure the object of such union or connection; provided that such union or connection shall only be with companies whose railroads are west of the Illinois River, or east of Urbana, running east and west, or whose roads run north and south from either terminus of the said Danville, Urbana, Bloomington and Pekin Railroad Company, and

38 the said corporation may, furthermore, lease or purchase, upon such terms as may be agreed upon, any other road or parts of roads, either wholly or partially constructed, which may constitute or be adopted as part of their railroad, and by such lease or purchase they shall acquire and become vested with all the rights and franchises pertaining to such road, or part of road, so leased or purchased in the right of way, maintenance and construction, and operation thereof.

§ 8. The said company is hereby authorized, from time to time, to borrow such sum or sums of money as may be necessary for the completing, equipping, operating and maintaining their said railroad, and to issue and dispose of the bonds at such rate of interest, not exceeding ten per cent., and at such discount as may be thought best for the benefit of the company, and to mortgage their corporate property and franchises, or convey the same by deed of trust, to secure the payment of any debt contracted by said company for the purpose aforesaid. And any such bonds that may be sold or disposed of at a less rate than par shall be as valid and binding upon said company as if the same were sold for the par value thereof.

§ 9. Counties, cities, towns or townships, through which said

39 (road) is to pass, or along the route thereof, which have held or shall hold elections upon the question of subscribing to the capital stock of said company, as by this act, or by any general law of this State, required or permitted, shall, upon such election being held and carried in favor of so subscribing, adopt the subscriptions of citizens of such county, city, town, or township, now made to said capital stock, under said articles of association, as part of their subscription, and, upon the issue of stock by such counties, cities, towns or townships, such citizens shall, by the board of directors, be released from individual liability therefor.

§ 11. That all the rights, privileges and advantages, with the limitations and restrictions conferred upon the Illinois Central Railroad Com-

pany; also the rights, privileges and advantages, with their limitations conferred by an act entitled "An act to provide for a general system of railroad incorporation," approved November 5, 1849, and the several acts amendatory thereof, are hereby conferred upon the Danville, Urbana, Bloomington and Pekin Railroad Company, and counties, cities, towns and townships shall be entitled to subscribe for stock in said company, in like manner and with like effect as provided in the acts referred to, and the acts amendatory thereof, except as by said acts and said articles of association qualified and limited.

§ 12. To further aid in the construction of said road by said company, any incorporated town or townships in counties acting under the township organization law along the route of said road, may subscribe to the capital stock of said company in any sum not exceeding two hundred and fifty thousand dollars.

§ 13. No such subscription shall be made until the question has been submitted to the legal voters of such incorporation, town or township in which the subscription is proposed to be made; and the clerk of each of said towns or townships is hereby required, upon the presentation of a petition signed by at least ten citizens who are legal voters and taxpayers of such town or township for which he is clerk, and in which petition the amount proposed to be subscribed shall be stated, to post up notices in at least three public places in each town or township, which notice shall be posted not less than thirty days before the day of holding such election, notifying the legal voters of such town or township to meet at the usual place of holding elections, in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription; provided, that where elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then and in that case no other election need be had; and the amounts so voted for shall be subscribed as in this act provided. And such elections are hereby declared to be legal and valid, as though this act had been in force at the time thereof and all the provisions hereof had been complied with.

§ 14. If it shall appear that a majority of all the legal voters of such towns or townships voting at such election have voted "for subscription," it shall be the duty of the president of the board of trustees, or other chief executive officer, if in incorporated towns, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such town or township, the amount so voted to be subscribed, and to receive from said company the proper certificates therefor. He shall also execute to said company, in the name of such towns or townships, bonds bearing interest at ten per cent. per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually, and which bonds shall be signed by such president, executive officer, or supervisor, and be attested by the clerk of the town or township in whose name the bonds are issued; and it shall be his duty to make out a record of the issuing of said bonds. Said bonds shall be delivered to the president or secretary of said company for the use of said company; and when any city or county shall hereafter vote to make subscription as aforesaid, the chairman of the board of supervisors of such county and the mayor of such city shall be required to subscribe to the capital stock of said company the amount so voted.

§ 18. At all elections for officers, and in all questions voted on by the stockholders of said company, the president or supervisor of such town

or township which shall have subscribed to said stock shall represent and cast the vote which said stock is entitled to cast, unless said town or township shall appoint some other person to perform said duty.

§ 19. The road to be constructed by said railroad company is hereby divided into three divisions, to wit: All that portion of the road
43 east of the Chicago Branch of the Illinois Central Railroad shall constitute the first division; that portion lying west of the Chicago Branch of the Illinois Central Railroad and east of the main line of the Illinois Central Railroad shall constitute the second division; and all that portion west of the Illinois Central Railroad and east of the Illinois River shall constitute the third division.

The immediate supervision and management of the construction of said divisions shall be under the control of the directors residing in each division; and said directors, representing their respective divisions, shall have power to organize, under such rules as the board of directors may establish, and shall have power to call in stock subscriptions, as the same become payable, and expend the proceeds of such subscriptions in the divisions where the subscribers are located, and shall keep records of their proceedings, and report to the board of directors, under such rules as said board may establish: Provided, That any incorporated town, city, or township, which has held or shall hold elections upon the question of subscribing to the capital stock of said company, may appropriate the whole or part of said subscription for the construction of any part of said road, that such city, township, or incorporated
44 town may elect, within the division in which city, incorporated town, or township may be.

§ 20. The president of the Bloomington and Pekin Railroad Company, incorporated by an act approved February 10, A. D. 1853, is hereby authorized and empowered to convey to William S. Maus, Samuel R. Saltonstall, and Jerome B. Clark, and Henry Conkling all the right, title and interest of the said Bloomington and Pekin Railroad Company in and to the right of way, grade, road-bed of the Bloomington and Pekin Branch of the Central Railroad, to the same extent as conveyed by the State of Illinois to said Bloomington and Pekin Railroad Company, to be held by said parties, in trust, until the completion of said third division of the Danville, Urbana, Bloomington and Pekin Railroad; and upon such completion, to be by them conveyed to said last named company; and said last named company are hereby vested with all the powers, rights, and privileges conferred by said act of February 10, A. D. 1853, upon the Bloomington and Pekin Railroad Company, not inconsistent with the provisions of this act. Said act of February 10, A. D. 1853, is hereby declared to be in full force and effect for the purpose of said conveyance. And the governor of the State of
45 Illinois is hereby authorized, upon application to him of the president of the Danville, Urbana, Bloomington and Pekin Railroad Company, to convey to said above named persons all the right, title, and interest which may be in the State of Illinois in and to the right of way, grade and road-bed of said Bloomington and Pekin Branch of the Central Railroad.

§ 24. This act shall be in force from and after its passage.

Approved February 28, 1867.

Third. The court further specially finds that, under the provisions of said charter, the legal votes of said township of Empire in due form of law, and in accordance with said act, on the 3rd day of June, A. D. 1867,

held an election & voted to subscribe for fifty thousand dollars to the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad, and that in pursuance of said election, and in accordance with the provisions of said act, the said township of Empire issued and delivered to the said railroad company its bonds in payment for the said subscription of $50,000 to the capital stock of said railroad company.

Fourth. The court further specially finds that, after the issuing of
46 said bonds, to wit, on the 20th day of August, A. D. 1869, the said Danville, Urbana, Bloomington and Pekin Railroad Company consolidated with the Indianapolis, Crawfordsville, and Danville Railroad Company at a joint meeting of the directors of said companies held at Urbana, in the State of Illinois, on the said 20th day of August, 1869; that said consolidated company was named and called the Indianapolis, Bloomington and Western Railway Company, and by that name has ever since been known and called; and that said consolidated company has ever since operated and controlled the lines of the railroads theretofore operated and controlled by the said two companies, except for such time as the property of said consolidated company has been in the hands of a receiver; and that said consolidated railroad forms one continuous line of road from Indianapolis in the State of Indiana to the city of Pekin, in the State of Illinois.

Fifth. The court further specially finds that, on the first day of September, A. D. 1869, the following petition was filed in the office of the town clerk of the said township of Empire, to wit:

To the clerk of the town of Empire, in the County of McLean, and State of Illinois:

47 We, the undersigned, citizens and legal voters of said town, do hereby respectfully request petition you to call an election, in pursuance of law and the requirements of the charter of the Danville, Urbana, Bloomington, and Pekin Railroad Company, for the purpose of voting for and against subscribing the sum of twenty-five thousand dollars as additional stock in aid of the construction & completion of the Indianapolis, Bloomington and Western Railroad, the conditions of said vote to be as follows, to wit:

That the said road be completed and the cars running thereon to the town of Leroy by the first day of July, A. D. 1870.

That the depot to be located and establishd for the town of Leroy be located within the limits of the present town plat of said town. That the subscription, if authorized by said vote, shall not be made until the foregoing conditions are complied with; but on such compliance that the supervisor subscribe said stock so voted, and issue and deliver bonds upon the credit of said town of Empire to the amount of such subscription in favor of said Indianapolis, Bloomington, and Western Railroad Company, which bonds shall be in sums of one hundred to one
48 thousand dollars each, and to bear interest at the rate of ten per cent. per annum from the date of their issue, and to run a period of not more than twenty years after date thereof at the option of the supervisor of said town of Empire.

David Cheney.	G. W. Potts.	C. W. Hardpence.
J. C. Potts.	S. D. Baker.	D. T. Crumbaugh.
Wm. H. Bartlett.	B. F. Parks.	J. V. Smith.
Talmage Ross.	Denton Young.	J. R. Palmer.
Y. Bonnett.	J. A. Clearwaters.	E. B. Sliers.

C. H. Rutledge.	E. C. Greenman.	J. M. White.
D. M. Sims.	J. T. Rhulman.	Robt. Semple.
Wm. W. Zimmerman.	T. D. Fisher.	H. C. Dickerson.
M. E. Ferguson.	J. V. Lincoln.	J. C. Binney.

Received and filed September 1st, A. D. 1869.

M. M. DICKERSON,
Town Clerk.

And that the foregoing petition was the only one filed, requesting said election for the purpose of subscribing the sum of twenty-five thousand dollars to the capital stock of said Indianapolis, Bloomington, and Western Railway Company.

49 Sixth. The court further specially finds that, in pursuance of said petition, the town clerk of said township of Empire issued and posted three notices in said town in words and figures as follows, to wit:

ELECTION NOTICE.

Whereas the citizens and legal voters of the town of Empire have, in writing, filed in my office a statement that a special election is necessary to the interests of said town, setting forth the object of the election, the inhabitants, legal voters of said town of Empire, are therefore hereby notified that a special election will be held at the town clerk's office in said town on Tuesday, the 12th day of October, A. D. 1869, at 9 o'clock a. m., for the purpose of voting for and against subscribing the sum of twenty-five thousand dollars as additional stock in aid of the construction & completion of the Indianapolis, Bloomington and Western Railroad, the conditions of said vote to be as follows, to wit: That the said road be completed and the cars running thereon to the town of Leroy by the first day of July, A. D. 1870.

That the depot to be located & established for the town of Le-
50 roy be located within the limits of the present town plat of said town. That the subscription, if authorized by said vote, shall not be made until the foregoing conditions are complied with; but on such compliance, that the supervisor subscribe said stock so voted, and issue and deliver bonds upon the credit of said town of Empire to the amount of such subscription in favor of the said Indianapolis, Bloomington & Western Railroad Company, which bonds shall be in sums of one hundred to one thousand dollars each, and to bear interest at the rate of ten per cent. per annum from the date of their issue, and to run a period of not more than twenty years after date thereof, at the option of the supervisor of said town of Empire, being the objects contained in said statement filed in my office.

Given under my hand at Leroy this 4th day of Sept., A. D. 1869.

M. M. DICKERSON,
Town Clerk.

And which was the only notice of said special election.

Seventh. The court further specially finds that, in pursuance of
51 said notice, an election was held, and resulted in a majority vote in favor of subscribing the sum of $25,000 to the capital stock of the said Indianapolis, Bloomington and Western Railway Company, and in payment therefor issued to said consolidated railway company additional bonds of the said township of Empire to the amount of $25,000.00.

Eighth. The court further specially finds that the bonds and coupons introduced in evidence in this case are a part of said $25,000 issue so issued as aforesaid, in payment for said subscription of $25,000 to the capital stock of said Indianapolis, Bloomington and Western Railroad Company; and that said bonds and coupons so offered in evidence, omitting their dates, dates of maturity, and numbers, are respectively in the words and figures following, to wit:

UNITED STATES OF AMERICA, STATE OF ILLINOIS.

No. .] EMPIRE TOWNSHIP RAILROAD BOND. [$500

Know all men by these presents that the township of Empire, in the county of McLean and State of Illinois, acknowledges itself to owe and be indebted in the sum of five hundred dollars lawful money of
52 the United States of America, which sum of money the said township of Empire promises to pay to the order of at the office of the county treasurer of said county on the twentieth day of March, in the year one thousand eight hundred and ninety, with interest thereon, at the rate of ten per centum per annum, which interest shall be payable yearly on the twentieth day of March in each year at the office of the treasurer of said county, upon presentation and delivery of the warrants or coupons severally hereto annexed, until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the State of Illinois, entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend the powers of and confer a charter upon the same," approved February 28th, 1867, and in accordance with the vote of the electors of said township, at the special election held Oct. 12th, 1869, in accordance with said act. And the faith of the township of Empire is hereby pledged for the payment of the said principal sum and interest as aforesaid.

In witness whereof the supervisor and clerk of said township of Empire have subscribed this bond this twentieth day of March, one thousand eight hundred and seventy.

53 JAS. BISHOP,
Supervisor.
D. C. CLARK, *Clerk.*

$50.] EMPIRE TOWNSHIP RAILROAD BOND. [No. .

Interest warrant.

Treasurer of McLean County pay to bearer March 20th, 18 , fifty dollars, being one year's interest on bond numbered as above.

JAS. BISHOP,
Supervisor.
D. C. CLARK, *Clerk.*

Ninth. The court further specially finds that upon the application of certain tax-payers of said town of Empire, the circuit court of McLean County, Illinois, enjoined on the 29th day of April, A. D. 1878, the further payment of the principal or interest, or any part of the bonds or coupons issued in payment of the said subscription of $25,000 to the capital stock of the Indianapolis, Bloomington, and Western Railway Company by said township of Empire, making the proper parties defendant,

and also the bondholders parties thereto, by the name of unknown owners and holders, and giving them notice under the chancery practice chapter by publication merely without personal service or notice
54 and that a *a* final decree has been rendered upon said bill perpetually enjoining the assessment and collection of taxes for the purpose of paying said bonds and coupons, and declaring said bonds and coupons void, said decree rendered some time in the fall of 1878.

Tenth. The court further specially finds that said consolidated company issued its bonds to the number of five million of dollars before the said election of the town of Empire, held on the 12th day of October, A. D. 1869, and to secure said bonds executed a mortgage upon all the property, both real and personal, then owned by the said company and including all its rolling stock, franchises, and other property then owned, held, or claimed by said company; and that said bonds for which such mortgage was given, amount to the entire value of the said road; and that the stock of said railway company at the time of the said election, Oct. 12th, 1869, were, and ever since that time have been utterly worthless.

Be it remembered that at the trial of said cause plaintiff then
55 and there objected to the evidence offered by defendant, and which is embodied in the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, & 10th special findings of the court, except so much of said 8th special finding as relates to plaintiff's bonds and coupons offered in evidence for and on the ground of irrelevancy; and plaintiff still objects and hereby preserves his exceptions to such evidence and the special findings thereon for such cause.

And the defendant, by its counsel, then and there objected to the admission of the evidence offered by the plaintiff, and still objects, and hereby preserves all legal objections to the admission of said evidence or any part thereof.

And upon the foregoing special findings the court found the issues joined in favor of the plaintiff, to which findings the defendant, by its counsel, then and there excepted.

Whereupon the defendant then and there by its counsel entered a motion to set aside said judgment, and for a new trial, which said motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Illinois:

June term, 1879.

56 SMEDLEY DARLINGTON }
vs.
THE TOWNSHIP OF EMPIRE. }

And now comes the defendant, by its counsel, and moves the court to set aside the findings in this case, and also the judgment, and to grant to the defendant a new trial for the following reasons:

1st. That the court erred in not finding that the election held in the town of Empire, on the 3rd day of June, 1867, by which the legal voters of said town of Empire voted to subscribe to the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company for $50,000 of its capital stock, and to issue in payment thereof $50,000 of the bonds of said township, and the issue of said bonds to said railroad company in

payment for said capital stock, exhausted the power of the town to vote a subscription under the charter of the said Danville, Urbana, Bloomington and Pekin Railroad Company, and that the subsequent issue of the $25,000 was without authority of law and void.

2nd. The court erred in finding that the defendant is liable on
57 the coupons in suit, which are coupons attached to the issue of the $25,000.00 of bonds.

3rd. The court erred in rendering judgment for the plaintiff on the evidence.

4. The court erred in holding that the voters of Empire Township were authorized by law to hold an election and vote a subscription of $25,000.00 to the capital stock of the Indianapolis, Bloomington and Western Railway Company.

5. The court erred in not finding that the election held in the town of Empire by which the bonds in evidence, and the coupons attached to said bonds were issued, was held without authority of law, and that the bonds issued in pursuance thereof, and the coupons thereto attached were issued without authority of law and void.

7. The court erred in not finding that by the consolidation of the Danville, Urbana, Bloomington and Pekin Railroad Company with the Indianapolis, Crawfordsville and Danville Railroad Company the power of the voters of the town of Empire to vote a subscription, and issue its bonds in payment for such subscription ceased, and that the bonds and coupons in evidence were issued without authority of law, and that the same are void.

58 8. The court erred as a matter of law in the findings in holding that the issue of the bonds in question was authorized by law. The court erred in admitting the bonds and coupons in evidence, for the reason that the evidence shows that the same were issued without authority of law and void.

9. The court erred in not rendering judgment for the defendant.

10. The court erred in holding that the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company authorized a vote by the legal voters of the town of Empire for the purpose of voting a subscription to the capital stock of the Indianapolis, Bloomington and Western Railway Company, and that, by a majority vote in favor of such subscription, that the township was authorized to issue its bonds in payment for the same.

11. The court erred in holding that the right to vote a subscription to the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company passed to the Indianapolis, Bloomington and Western Railway Company by the consolidation of the Danville, Urbana, Bloomington and Pekin Railroad Company with the Indianapolis, Crawfordsville and Danville Railroad Company, before such vote was taken,
59 by which consolidation the Indianapolis, Bloomington and Western Railway Company was formed.

12. The court errred in not excluding all the evidence offered by the plaintiff and rendering judgment for the defendant.

13. For the foregoing reasons, and for other reasons that will be pointed out on the hearing of this motion, the defendant, by its counsel, moves the court, 1st, to set aside its findings, 2nd, to grant to the defendant a new trial.

THOMAS F. TIPTON,
Deft's Att'y.

Which said motion was by the court then and there overruled, to

which ruling of the court the defendant then and there excepted, and thereupon the court, on the findings, and plaintiff's said securities offered in evidence under the common counts of said declaration, entered judgment that the plaintiff recover of defendant the sum of eight thousand one hundred and seventy-eight & $\frac{05}{100}$ dollars, ($8,178.05,) damages, and dollars, the costs of suit, to which ruling and judgment of the court the defendant then and there excepted.

60 To preserve all which matters of record the defendant asks that this bill of exceptions be signed and sealed by the court, which is accordingly done.

[SEAL.] S. H. TREAT.

(Endorsed:) Filed Oct. 1, 1879. J. A. Jones, clerk.

And afterwards, to wit, on said 18th day of November, in the year of our Lord aforesaid, came said defendant by its attorney and filed in said clerk's office its bond on writ of error, in words and figures following, to wit:

Bond on writ of error.

Know all men by these presents that the Township of Empire, in the county of McLean and State of Illinois, and in the southern district of Illinois, as principal, and Robert Barr, Malon Bishop, Hamilton Gilbert, Wm. L. McCann, Hiram Buck, J. M. York, J. D. Gilmore, J. A. Bishop, J. S. Wiley, J. Q. Bishop, John P. Barr, D. L. Morehouse, Y. Barnett, J. W. Murfield, Jas. Bonnett, J. H. L. Crambaugh, G. W. Penn, Zachariah Chick, John Tipton, and John M. Stilwill, as sureties, are held and firmly bound unto the plaintiff, Smedley Darlington, in the penal sum of ten thousand dollars, lawful money of the United , to be paid to the said Smedley Darlington, his heirs, executors, administra-

61 tors, or assigns, firmly by these presents. Signed with our hands and sealed with our seals, and dated this seventeenth day of September, A. D. 1879.

The condition of the above obligation is such, that whereas the above named Smedley Darlington did on the seventeenth day of September, 1879, recover a judgment against the above named The Township of Empire, in the circuit court of the United States for the southern district of Illinois, for the sum of eight thousand one hundred and seventy-eight dollars and five cents, and costs of suit, from which said judgment the said The Township of Empire has prayed for and obtained an appeal to the Supreme Court of the United States *of the United States* of America:

Now if the said The Township of Empire shall prosecute its appeal with effect, or in case of affirmance of the said judgment, that the said Township of Empire shall well and truly pay said judgment, interest,

and costs, then and in that case this bond shall be null and void; otherwise to remain in full force and effect.

JOHN KLINE, [SEAL.]
Supervisor. [SEAL.]
S. D. VANDEVENTER, [SEAL.]
Town Clerk.

62
ROBERT BARR. [SEAL.]
MALON BISHOP. [SEAL.]
HAMILTON GILLETT. [SEAL.]
WM. L. McCANN. [SEAL.]
HIRAM BUCK. [SEAL.]
J. M. YORK. [SEAL.]
J. D. GILMORE. [SEAL.]
J. A. BISHOP. [SEAL.]
J. S. WILEY. [SEAL.]
J. Q. BISHOP. [SEAL.]
JOHN P. BARR. [SEAL.]
D. L. MOREHOUSE. [SEAL.]
Y. BONNETT. [SEAL.]
J. W. MURFIELD. [SEAL.]
JAS. BONNETT. [SEAL.]
J. H. L. CRAMBAUGH. [SEAL.]
G. W. PENN. [SEAL.]
ZACHARIAH CHICK. [SEAL.]
JOHN TIPTON. [SEAL.]
JOHN M. STILWELL. [SEAL.]

63 (Endorsed:)
Approved.

S. H. TREAT,
Dist. Judge.

(Also endorsed:)
Filed October 1st, A. D. 1879.

J. A. JONES, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

In circuit court, southern district of Illinois.

I, John A. Jones, clerk of said court, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause, wherein Smedley Darlington is plaintiff and The Township of Empire is defendant, as fully and completely as same appear of file and of record in my said office.

Witness my hand and the seal of said court, at Springfield, in said district, this 6th day of December, A. D. eighteen hundred and seventy-nine, and of our Independence the one hundred and fourth year.

[SEAL.] J. A. JONES, *Clerk.*

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings and also in the rendition of

the judgment of a plea which is in the said court before you, between Smedley Darlington and The Township of Empire, a manifest error hath happened, to the great damage of the said The Township of Empire, as by its complaint appears: We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the
65 fourth Monday of October next in the said Supremé Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Springfield, in said district, this 1st day of October, in the year of our Lord eighteen hundred and seventy-nine and of our Independence the one hundred and fourth year.

J. A. JONES,
Clerk of the U. S. Circuit Court,
Southern District of Illinois.

(Indorsed:) U. S. circuit court. Smedley Darlington vs. Township of Empire. Writ of error. Filed October 1st, 1879. J. A. Jones, clerk.

66 UNITED STATES OF AMERICA, *ss:*

To Smedley Darlington, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States *to be and appear at a Supreme Court of the United States* to be held at Washington on the fourth Monday of October next, being the third Monday of the term, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein The Township of Empire is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness S. H. Treat, judge of the district court of said district, this 1st day of October, A. D. 1879.

S. H. TREAT.

67 We do hereby accept service of the within citation this 1st day of October, A. D. 1879.

CULLOM, SCHOLES & MATHER,
Attorneys for Def't in Error.

(Indorsed:) U. S. circuit court, southern dist. Ills. Smedley Darlington vs. Township of Empire. Citation.

(Indorsement on cover:) No. 1097. The Township of Empire, plaintiff in error, vs. Smedley Darlington. S. Illinois C. C. U. S. Filed 18th December, 1879.

No.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

THE TOWNSHIP OF EMPIRE

—— VS. ——

SMEDLEY DARLINGTON.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT OF APPELLANT.

L. WELDON,
Counsel for Appellant.

Pantagraph Print, Bloomington, Illinois.

Supreme Court of United States.

OCTOBER TERM, 1879.

THE TOWNSHIP OF EMPIRE

—vs.—

SMEDLEY DARLINGTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT OF THE CASE.

This is an action of assumpsit, brought by appellee against appellant, to recover on five bonds, and a number of coupons, which were attached to the bonds in suit and other bonds. The bonds in suit, and the other bonds to which the coupons in suit were attached, were of an issue of $25,000 of the bonds of the Township of Empire, issued in blank to the Indianapolis, Bloomington and Western Railway Company, in pursuance of a vote of the electors of said township at an election held in said township on the 12th day of October, 1869. The bonds in suit, and the bonds to which the coupons in suit were attached, bear date March 20, 1870, and each of said bonds recites that they were issued by virtue of the authority contained in the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, and by a vote of the electors of said town held October 12, 1869, in accordance with said charter.

The Danville, Urbana, Bloomington and Pekin Railroad Company was incorporated by an act of the legislature of the State of Illinois, entitled: "An Act to amend the articles of association of the Danville, Urbana, Bloomington and Pekin

Railroad Company, and to extend the powers and confer a charter upon the same." See private laws of 1867, vol. 2, p. 758. Under § 1 of this charter, the Danville, Urbana, Bloomington and Pekin Railroad Company were authorized to construct and complete a railroad extending from the City of Pekin, in the County of Tazewell, in the State of Illinois, through or as near as practicable to the towns of Tremont, Mackinaw Town, Concord, Bloomington, Leroy, Mount Pleasant, Mahomet, Champaign City, Urbana and St. Joseph, to the eastern boundaries of the State of Illinois. The same to be commenced within five years, and completed within ten years,—the first section further providing that said company shall not have the power to locate or construct a road upon any other route than connecting the above-named points by such location as may be deemed best for the interests of said company. *Provided*, that if any incorporated *town* or *city* on the line of said route shall refuse or neglect to subscribe a just and equal amount towards securing the building of said road, then, in that case, the directors of said company shall have the power to be exercised, in their discretion, so to change the route as not to run said road through the incorporated town or city so refusing or neglecting to subscribe. *Provided*, that the directors of the division in which such incorporated town or city may be shall have the sole power of determining as to the sufficiency of such subscription. *And provided further*, that no such power shall be construed to be possessed by the directors, when the county or township in which such incorporated town or city may be shall have subscribed, or before such change in route is made, to the capital stock of said company a sum not less than $100,000. There is no law authorizing the issue of the bonds and coupons in question, unless authorized by this charter.

In pursuance of the provisions of the authority vested in the Township of Empire, the electors of said town held an election on the 3d day of June, 1867, and voted to subscribe the sum of $50,000 to the capital stock of the said Danville, Urbana, Bloomington and Pekin Railroad Company, which subscription was made by the Township of Empire. In pursuance of this vote and subscription, the Township of Empire did, on the 1st day of October, 1867, execute and *deliver* $50,000 of its bonds to the said Danville, Urbana, Bloomington and Pekin Railroad Company. There is no question made but that this subscription was satisfactory to the directors of the railroad company, and a full compliance with the charter of the railroad company

on the part of the Township of Empire, and by which the railroad company were bound to make Leroy, in said township, a point in the location of said railroad.

On the 20th day of August, 1869, more than two years after the election and subscription of the $50,000 to the Danville, Urbana, Bloomington and Pekin Railroad Company, the said company consolidated with the Indianapolis, Crawfordsville and Danville Railroad Company, a railroad corporation of the State of Indiana.

On September 1, 1869, and after the consolidation of the Danville, Urbana, Bloomington and Pekin Railroad Company with the Indianapolis, Crawfordsville and Danville Railroad Company, and the creation of the new corporation, the Indianapolis, Bloomington and Western Railway Company, a part of the citizens and voters of the Town of Empire filed in the office of the town clerk of said town, a petition requesting the town clerk to call an election to vote for or against subscribing the sum of $25,000 to the new corporation. And in pursuance of this petition, an election for that purpose was called and held on the 12th day of October, 1869, at which election a majority of the voters of the town, voting at said election, voted in favor of the proposed subscription of $25,000. In pursuance of this election and vote for an additional subscription to this corporation, the officers of the town issued the bonds of the town, with coupons attached, to the new corporation; and the bonds and coupons in suit are bonds and coupons of this issue of bonds. The bonds recite that they are issued to the Indianapolis, Bloomington and Western Railroad Company, by virtue of an election held on the 12th day of October, 1869, long after the consolidation, and by virtue of the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company.

The main points relied on for a reversal of this judgment are: 1. That the vote and subscription of the Township of Empire, for $50,000 of the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company, and the issue of its bonds in payment thereof, exhausted the power of the township, under the charter of the railroad, so to vote a subscription. 2. That the bonds were issued without authority of law. 3. That no power was vested in the Township of Empire to subscribe to the capital stock of the Indianapolis, Bloomington and Western Railway Company.

ASSIGNMENT OF ERRORS.

1. The Court erred in not holding on the facts, found by the Court, that the bonds and coupons in suit were issued without authority of law, and that the same were void, for the reason that a valid subscription had been previously made by the township under the charter in question, and thereby power to subscribe by the township was exhausted.

2. The Court erred in not holding that the bonds and coupons in suit were issued without authority of law, and that the same were void.

3. The Court erred in not granting a new trial to appellant, for the reasons specifically stated in the motion for the new trial.

ARGUMENT AND BRIEF OF PLAINTIFF IN ERROR.

Assignment of Error.—1. The Court erred in not holding on the facts, found by the Court, that the bonds and coupons in suit were issued without authority of law, and that the same were void, for the reason that a valid subscription had been previously made under the charter in question, and that power to subscribe by the township was exhausted.

POINT I.

The election, held by the electors of the Township of Empire, on the 3d day of June, 1867, under the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, whereby said town voted to subscribe $50,000 to the capital stock of said company, and the subsequent execution and delivery, by the Township, of $50,000 of its bonds to said company, exhausted the power of the Township, under the terms of the charter of said Railroad Company, and an additional subscription to the capital stock of said company and issue of additional bonds of the Township in payment therefor, was without authority of law, and void.

If there was no power, vested by law, in the supervisor and town clerk of the Township of Empire, to issue and deliver the bonds and coupons in suit, the same are void in the hands of the appellee.

St. Joseph Township vs. Rogers, 16 Wall, 644.

Barnes vs. Town of Lacon, 84 Ill., 461.

McClure vs. Town of Oxford, 94 U. S., 429.

If the bonds and coupons in suit were issued without authority of law, no subsequent act of the township, or of the legislature, could legalize them, and they are absolutely void.

Marshall vs. Silliman, 61 Ill., 218.

Wiley vs. Silliman et al, 62 Ill., 170.

1 *Dillon on Municipal Corporations*, 524.

School Directors vs. Miller, 54 Ill., 338.

Bissell et al vs. Kankakee, 64 Ill., 249.

Mayor vs. Ray, 19 Wall, 468.

Marsh vs. Fulton Co., 10 Wall, 676.

Starin vs. Genoa, 23 N. Y., 437.

The long-established rule of all the Courts is, that bonds issued without power, as distinguished from a defective execution of a power, are void, and that no recital of the officers of a township will afford protection to even bona fide holders for value.

Force vs. Town of Batavia, 61 Ill., 100.

Williams vs. Town of Roberts, 88 Ill., 13, and authorities there cited.

Barnes vs. The Town of Lacon, 84 Ill., 461.

George vs. Oxford Township, 16 Kan., 72.

The doctrine of the Silliman cases, *supra*, was followed by this court in the *Township of Elmwood vs. Marcy*, 92 U. S., 289.

Following:

Harwood vs. The St. Clair Drainage Co., 51 Ill., 130.

Lovingston vs. Wider, 53 Ill., 302.

The People ex rel vs. The Mayor of Chicago, 51 Ill., 17.

Hessler vs. Drainage Com'rs, etc., 53 Ill., 105.

See, also,

Town of Concord vs. Portsmouth Sav'gs Bank, 92 U. S., 625.

The Floyd Acceptance Cases, 7 Wall, 666.

The power in the case at bar was to vote a subscription to a particular road—not to any road or company of which the particular road might finally become a constituent part, and certainly not to a consolidation unauthorized by section 7 of the charter in question. And if the bonds were issued without authority of law, and were void, the levy of taxes and payment of interest would not render them valid.

Schuyler Co. vs. Farwell, 25 Ill., 181.

Marshall Co. vs. Cook, 38 Ill., 48.

Appellee, and, in fact, all purchasers of municipal bonds, are bound to take notice of the constitution and legislation of the state relating to the power of the municipality to issue the bonds and coupons.

Harshman vs. Bates Co., 92 U. S., 569.

Town of East Lincoln vs. Davenport, 4 Otto, 801.

Williams vs. The Town of Roberts, 88 Ill., 21.

The powers conferred on the Township of Empire by the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company must be strictly construed.

Rex vs. Croke, Cowper, 26.

Kirk vs. Norvill, 1 T. R., 124.

Willcock on Municipal Corp., 26.

New York Fire Ins. Co. vs. Ely, 5 Conn., 560.

Commonwealth vs. Erie & Northeastern R. R. Co., 27 Pa. S. R., 339.

Mercer County vs. Pittsburg & Erie R. R. Co., Id., 390.

Oebrick vs. City of Pittsburg, Pittsburg Leg. Jour., No. 45.

Atlantic & Ohio R. R. Co. vs. Sullivant, 5 Ohio, S. R., 276.

Pierce vs. Madison & Indianapolis R. R. Co., 21 Howard, 441.

Harding vs. R. R. I. & St. L. R. R. Co., 65 Ill., 92.

Chestnutwood et al vs. Hood et al, 68 Ill., 132.

In the case of *Gaddis vs. The County of Richland*, reported in the Chicago Legal News of date December 20, 1879, it is held by the Supreme Court of Illinois, that powers conferred upon municipal corporations must be by express grant, or such as follow by reasonable implication as necessary to the duties imposed or the privileges conferred. The power to create a debt against a municipality for subscription to the stock of a railroad, or to issue bonds to raise money in aid thereof, must be conferred by grant of the law making power, and the particular mode pointed out in the grant must be followed. The charter of the Danville, Urbana, Bloomington and Pekin Railroad Company contemplated but one election in a township, and section 13 of the charter provides that where elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, that then, and in that case, no other election need be had. Although this provision is in the nature of a curative act, it seems to imply that one vote in favor of a subscription was all that was contemplated by the act of incorporation. "An enabling act gives to corporations," says Chief Justice Marshal, "all the power they possess. It enables them to contract; and when it

prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

Head vs. Providence Ins. Co., 2 Cranch, 127.

In statutes, as in contracts, the right of election, where exercised like the execution of a power, satisfies the right.

Musser et al vs. Railway Co., 7 Am. Law Reg., 286, old series.

The supervisor and town clerk have no legal right to issue bonds without lawful authority from the electors of the town. The supervisor and town clerk, neither separately nor associately, are the corporate authorities of their town. *Williams vs. The Town of Roberts*, 88 Ill., 21. They are simply town officers, with limited duties to perform in respect to town affairs; and legislative permission to these officers to hold *an* election, will not authorize them, or either of them, to call elections, from time to time, for the purpose of voting subscriptions to a railroad company. If this proposition is not true, there can be no such thing as an election, for otherwise it would be dependent on the varying and changing opinions and minds of those exercising it. If the power of the Township of Empire to hold an election, and vote to subscribe to the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company, was exhausted by its former election and subscription to the capital stock of this company, and its payment for the same by the execution and delivery of its bonds to the company, then the township had no more power to hold the second election and make the subscription and issue the bonds and coupons in suit, than if no authority had ever been conferred on the township to make a subscription to this company. It is held by the Supreme Court of Illinois, in the case of *Gaddis vs. Richland Co.*, *supra*, that where an act conferring power on the County Court to call the election to vote for or against a subscription, that an election called by the board of supervisors is void, and confers no power to subscribe for stock or issue bonds on behalf of the county. The Supreme Court of Illinois, in *Williams vs. Town of Roberts*, 88 Ill., 22, thus defines the township system of Illinois: "Under our system of township organization there is no officer or board representing the corporate authority of the town. The electors, only, represent it; and they, in doing so, must, and

do, necessarily act through town meetings or town elections; and it is not pretended they may, or did in the present instance, bind the town in any other way." If the second election was unauthorized by law, then the proceedings of the town were void, and the bonds in suit have no validity. It is the settled rule, in Illinois, that whoever deals in municipal bonds is chargeable with knowledge whether these precedent conditions were so complied with as to authorize the issuing of the bonds. In *Williams vs. Town of Roberts, supra*, the Court review the Illinois authorities upon this question, and say: "This Court has repeatedly announced the doctrine that where a municipality is empowered to subscribe to the capital stock of a railroad company and issue its bonds in payment of the subscription, that it is also required that there shall first be an affirmative vote of a majority of the electors of the municipality to that effect. No power exists to make the subscription and issue the bonds, until after such vote shall have been obtained at an election held for that purpose, called by the authority prescribed by law, and upon such notice of the time and place of holding the election as the law should direct; and that whoever deals in municipal bonds is chargeable with knowledge whether these precedent conditions to the existence of the power of making the subscription and issuing the bonds have been complied with. *Marshall County vs. Cook*, 38 Ill., 48. *People ex rel, etc., vs. Supervisors of Logan County*, 63 Ill., 384. *Harding vs. Rockford, Rock Island and St. Louis R. R. Co.*, 65 Ill., 90. *Middleport vs. Ætna Life Ins. Co.*, 82 Ill., 562." The records of the township, of which appellee is presumed to have had full notice, clearly show that there had been a previous vote and subscription by the township, to the Danville, Urbana, Bloomington and Pekin Railroad Company, and he was bound to know that the township had previously exercised its power to vote a subscription and issue its bonds under the charter of said railroad company, and that that power, when once exercised under the charter, was exhausted.

Assignment of Error.—The Court erred in not holding that the bonds and coupons in suit were issued without authority of law, and that the same were void.

POINT II.

By the consolidation of the Danville, Urbana, Bloomington and Pekin Railroad Company with the Indianapolis, Crawfordsville and Danville Railroad Company, a new corporation was created, by the name of "The Indianapolis, Bloomington and Western Railway Company," and the original companies were dissolved.

The only authority of law for this consolidation is section 7 of the charter of the Danville, Unbana, Bloomington and Pekin Railroad Company, and the general law upon that subject. The general law Scates stat., vol. 2, pp. 951, 952, provides:

"§ 1. That all railroad companies and plank-road companies now organized, or hereafter to be organized, which now have, or hereafter may have, their termini fixed by law, whenever their said road or roads intersect by continuous lines, be, and the same are hereby, authorized and empowered to consolidate their property and stock with each other, and to consolidate with companies out of this state, whenever their lines connect with the lines of such companies out of this state.

"§ 2. Such consolidation may take place whenever the said companies shall respectively agree upon the terms and conditions of the same; and the said companies, when so consolidated, shall be authorized to agree upon the name or names of such consolidated company, and by such name or names the said consolidated company shall be a body corporate and politic, shall have a common seal or seals, and by such name or names shall be respectively contracted with and make contracts, shall sue and be sued, implead and be impleaded with, and shall have all the powers, franchises and immunities which the said respective companies shall have by virtue of their respective charters, before such consolidation passed within the State of Illinois; provided, that each consolidated company shall file for record, in the office of the secretary of state, a copy of their said articles of consolidation, evidenced by the signature of the presiding officer of each of the said companies, and the corporate seal thereof.

"§ 3. The corporation or corporations formed by virtue of the provisions of this act, shall have power to increase their cap-

ital to any amount required by resolution of their respective boards of directors, not exceeding the amount of the cost of the roads and works constructed and equipped by them; to borrow money and fix the rate of interest therefor; to issue bonds, and the same to sell at such a price as they may deem expedient, such sales being hereby authorized and confirmed; and to make any other contracts authorized by the by-laws of the said corporation or corporations, within the perview of their said charters.

"§ 4. Such corporation or corporations, when so formed, shall have the same power to consolidate with other companies, when their lines connect, upon such terms as may be agreed upon by them, respectively.

"§ 5. No company in this state shall be authorized under the provisions of this act to consolidate with any company beyond the limits of this state, until the termini of such company in this state shall first have been fixed, by the laws of this state, at the boundary line thereof."

It is not pretended that the consolidation was authorized by section 7 of the charter, but we suppose that it will be contended that the consolidation was made under this statute. If so, a new corporation was created, and the old companies were dissolved.

Railroad Company vs. Georgia, 8 Otto, 359.

McMahan vs. Morrison, 16 Ind., 172.

Lauman vs. The Lebanon Valley R. R. Co, 30 Penn., S. R., 42.

This consolidation was full and complete, and not a merger of one into the other, as was in the case of *Central Railroad and Banking Co. vs. Georgia*, 92 U. S., 665.

There was no power vested in the electors, the corporate authority of the Township of Empire, under the charter of "The Danville, Urbana, Bloomington and Pekin Railroad Company," to hold an election and vote to subscribe to the capital stock of "The Indianapolis, Bloomington and Western Railway Company," and issue its bonds in payment therefor to that company, the original company having been dissolved.

This proposition of law is thus stated in Burroughs on Taxation, p. 413: "When a subscription or issue of bonds is authorized to one corporation and is made to another, there is a

want of power which makes the bonds void. This is true when two railroads are consolidated, and the authority was to issue bonds in aid of *one* of the railroads. The consolidated company is a new corporation, and there is no authority to issue bonds in favor of such corporation. And so where authority is given to counties along the line of a railroad to aid the railroad, the road at that time only running north of a particular river, when subsequently the charter of the road is amended so as to allow it to run south of that river, bonds issued by counties south of that river were declared void. But where a county is authorized to issue bonds in aid of a railroad, and the law of the state allows of the consolidation of railroads, the consolidated company to have all the rights of the two companies, bonds issued *before the consolidation* to one of the roads are valid, and, even if issued afterward, if the subscription had been made, and the right vested in one of the roads, the bonds, in the hands of the consolidated road, would be valid." This is the doctrine of the case of *Nugent vs. The Board of Supervisors of Putnam Co.*, 19 Wall., 241, and seems to be the settled law of this Court.

The question here submitted, is the power of the Township of Empire, under the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, to vote a subscription and subscribe to the capital stock of the Indianapolis, Bloomington and Western Railway Company, and after the amalgamation of the stock of the Danville, Urbana, Bloomington and Pekin Railway Company with the stock of the Indianapolis, Crawfordsville and Danville Railroad Company, and issue its bonds in payment for such amalgamated stock, there being no authority in the township, previous to the consolidation, to vote a subscription to the Indianapolis and Crawfordsville Railroad Company, or to the consolidated company.

In the case of *Town of East Lincoln vs. Davenport*, 4 Otto, 801, the statute authorizing the town of East Lincoln to subscribe to the capital stock of the railroad in question provided, that if a majority of the legal voters voting at an election held for that purpose shall be found to be in favor of such subscription, it shall be deemed and held that such town had taken stock in said company according to the proposal made. Under this statute an election was held, which resulted in favor of a subscription, and it was held that the statute made such majority

equivalent to and a substitute for a subscription on the books of the company, and that such subscription passed to the consolidated company, and the validity of the bonds issued by the town of East Lincoln was sustained on the ground that the town had made a lawful subscription to one of the constituent companies, and that the same become and was a vested right which would pass to the consolidated company. But in the case at bar, there had been no election held, and by the charter in question a vote is not equivalent to, or a substitute for, a subscription. No subscription had been made, nor could a subscription, without a lawful vote of the electors of the township, have been made. The Township of Empire was under no legal or moral obligation to subscribe to the old company, nor had they done any act whatever toward making a subscription at the date of the consolidation, so that the real point raised by this assignment of error, is the assertion of the "power of the Township of Empire, under the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, to vote a subscription to the capital stock of the Indianapolis, Bloomington and Western Railroad Company." Again, the authority in the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, is to subscribe to that company, and not to the new corporation. This subscription could not be lawfully made under the authority of *Town of Big Grove vs. Wells*, 65 Ill., 263. *McWhorter vs. The People ex rel*, 65 Ill., 290. The two companies are not the same. *Town of Big Grove vs. The People*, 65 Ill., 263. It is a rule of universal application, that where the power on the part of the officers of the township to make the contract for the corporation never existed, negotiable securities issued by them are invalid in the hands of all persons.

Town of Middleport vs. Ætna Ins. Co., 82 Ill., 562.

School Directors vs. Fogleman, 76 Ill., 189.

Bissell vs. Kankakee, 64 Ill., 249.

Town of South Ottawa vs. Perkins, 94 U. S., 260.

McClure vs. Township of Oxford, 94 U. S., 432.

Marsh vs. Fulton Co., 10 Wallace, 683.

School Directors vs. Sippy, 54 Ill., 287.

And that there can be no ratification save by those who are capable to contract, nor of contracts save of those which it is competent for them to perform.

Marsh vs. Fulton Co., 10 Wall., 683.
Boom vs. City of Utica, 2 Barb., 105.

If there was any authority to vote a subscription by the electors of the Township of Empire, it was to vote a subscription to the Danville, Urbana, Bloomington and Pekin Railroad Company, and not to the Indianapolis, Bloomington and Western Railway Company. *Marsh vs. Fulton Co., supra.* It may be insisted that the consolidation in this case, carried with it the right and power of the township to vote a subscription, and issue its bonds in payment thereof, to the new corporation. Such, we think, is not a fair construction of the act where, as in this case one of the constituent companies had no power to receive a subscription, and the township no authority to subscribe to the capital stock of such company. Such construction would authorize that to be indirectly done which can only be directly done under express legislative authority.

It will, doubtless, be insisted by counsel, that this case comes within the principle of the case of *County of Scotland vs. Thomas*, 94 U. S., 682; but by a careful examination of the facts in the case at bar and the Scotland county case, it will be found that the cases are very different. In the Scotland county case, the county had power to subscribe without a vote of the electors, and the case was decided upon the authority of the *State vs. Green Co.*, 54 Mo., 540, where it was held by the Supreme Court of that state, that simple consolidation does not extinguish the power of the counties to subscribe, or the privilege of the companies to receive subscriptions. But in the case at bar, there was no power in the township to subscribe at the time of the consolidation, and the power, in no event, could be obtained, except by a vote of the electors. Again, the county authorities was properly regarded as the representatives of the electors; and under the system in Illinois, this would perhaps be true. In Illinois, prior to the adoption of the present constitution, county boards, such as boards of supervisors, county commissioners, and the municipal authorities of incorporated cities, towns and villages, might, when empowered so to do by proper legislation, subscribe to the capital stock of railroad corporations, without first submitting the question to the electors of the municipality, they being considered as the representatives of the electors. But under the township

organization system of the state, there is no officer or board representing the corporate authority of the town, the electors, only, representing it, and they must necessarily act through town meetings or elections.

Williams vs. The Town of Roberts, 88 Ill., 22.

The recital in the bonds furnished appellee full notice that the bonds were issued without authority of law.

McClure vs. Township of Oxford, 94 U. S., 429.
Barnes vs. Town of Lacon, 84 Ill., 464.

The Missouri cases can have no application to this case, for the reason that the statute of that state is wholly different from the statute of Illinois, and the rule of decision in the courts of that state is different from the rule in Illinois.

Bissell et al. vs. Kankakee, 64 Ills., 249.
Ryan vs. Lynch, 68 Ill., 160.
See also, *Mayor vs. Ray*, 19 Wallace, 468.
Town of South Ottawa vs. Perkins, 94 U. S., 260.
1 *Dillon on Mun. Corp.*, 524.
Clark vs. DesMoines, 19 Ia., 199.
Marsh vs. Fulton Co., 10 Wallace, 676.
Chisholm vs. City of Montgomery, 2 Woods, 584.
Slavin vs. Genoa, 23 N. Y., 437.

A purchaser of municipal bonds is bound to take notice of the extent of the powers exercised by the officers of a municipal corporation. See 1 *Dillon on Mun. Corp.*, 464, and note.

Assignment of Errors.—The Court erred in not granting a new trial to appellant, for the reasons specifically stated in the motion for the new trial.

POINT III.

If we are right upon either of the propositions heretofore discussed, then a new trial should have been granted; and we respectfully submit, that on the facts found by the Court, when applied to the law of this case, that the law is with the appellant, and that the judgment of the Court below should be reversed.

Respectfully submitted,

L. WELDON,
Counsel for Appellant.

No. 1097.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1879.

THE TOWNSHIP OF EMPIRE, *Appellant,*
vs.
SMEDLEY DARLINGTON, *Appellee.*

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

S. M. CULLOM,
COUNSEL FOR APPELLEE.

To be submitted under Rule XX., per stipulation in Record. See Transcript, page 9.

SPRINGFIELD:
H. W. ROKKER, BOOK AND JOB PRINTER.
1880.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1879.

THE TOWNSHIP OF EMPIRE, Appellant,
vs.
SMEDLEY DARLINGTON, Appellee.

ARGUMENT AND BRIEF OF APPELLEE.

Possession by appellee of the bonds and coupons recovered upon in this suit raises the legal presumption in his favor, that he became the holder and owner before due, for value, and without notice.

Chambers County vs. Clews, 21 Wall., 323.

The pleadings set out in the record disclose appellee to be a citizen of Pennsylvania; therefore, with the foregoing legal presumption in his favor, of what must he take notice in purchasing these bonds?

The authorities are clear and numerous that he need look to nothing but the bonds and the law.

If the law confers power upon the municipality to subscribe and issue the bonds, and the bonds disclose no irregularities or defenses upon their face, then such a purchaser is protected.

Town of Coloma vs. Eaves, 2 Otto, pp. 490 and 491.

Knox vs. Aspinwell, 21 How., 544.

Moran vs. Miami County, 2 Black, 732.

Mercer County vs. Hackett, 1 Wall., 83.

Supervisors vs. Schenk, 5 Wall., 784.

By the 12th section of the Danville, Urbana, Bloomington and Pekin R. R. charter, power is given appellant to subscribe to the capital stock of said road an amount not exceeding $250,000.

P. 16 of Transcript.

Appellant is a township embraced within the provision, as it was located along the route of said road.

P. 16 of Transcript.

The bonds, upon their face, do not disclose but that they were *voted, subscribed* and *issued* to the *Danville, Urbana, Bloomington and Pekin R. R. Co.* in exchange for *its stocks.*

The payee's name being left in blank, and the only railroad mentioned or referred to in the bond being *this one* where the bonds recite its charter as the authority for their issue.

See copy of bond, p. 20 of Transcript.

This amounts to a *decision* by the town supervisor, under section 14 of the charter, p. 16 of T., that the bonds were voted and issued *as authorized* by the charter referred to in the recital.

Beyond these recitals and assurances in the bonds, the purchaser is not bound to look for evidence of the existence of things *in pais.*

Coloma vs. Eaves, 2 Otto, p. 490.

This view, seems to us, is a complete answer to appellant's point that these bonds were voted to a consolidated road formed of the D., U., B. & P. and the I., C. & D. railroad companies.

Because, if the purchaser is not obliged to search for the evidence

of anything in pais, but can safely rely upon examining the law and face of the bonds *only*, before purchasing, then he need not inquire whether a consolidation has taken place before the vote is had. He finds power in the law for appellant to vote and issue bonds to the D., U., B. & P. road. He finds further, by section 14 of that law, that the duty is confided to the supervisor to subscribe and issue the bonds when the conditions of the act have been complied with.

By reading the bonds he is assured that it is issued "*by virtue* of a law, etc., entitled" (citing the D. U. B. & P. charter) "and an election held *in accordance with said act*."

Whether the bond is issued *as*, *and to whom*, authorized by the act, and in pursuance of an election *such as authorieed by the act*, are questions confided to the supervisor to decide by the 14th section, and which the purchaser is in no condition to decide for himself.

We think, then, that upon the face of the bonds and the law, appellee is fairly within the protection of the doctrine as announced in—

Coloma vs. Eaves, 2 Otto, on page 490, and
County of Warren vs. Marcy, 97 U. S. p. 96.

But, appellant insists it is a question of *power*, and because the vote authorizing these bonds was *after* the consolidation of the D. U. B. & P. road with the I. C. & D. road, forming the consolidated company called the I. B. & W., therefore the vote was unauthorized and the town had no power to act.

We think the facts of this case invoke a different result in law, even admitting the purchaser was required to ascertain outside of the face of the law and the bonds, that there was a consolidation before this vote had.

What are the facts, and then what is the law?

The termini of the D. U. B. & P. road were fixed by its charter, the one at Pekin, and the other at the eastern boundary of the State.

Section 1, of Charter, pp. 13 and 14 of Transcript.

The consolidation was with an Indiana road, running from Indianapolis to the eastern boundary of the State of Illinois, and there connecting with the D. U. B. & P. road, and thereby forming a continuous line of road from Indianapolis to Pekin.

See 4th special finding of the Court, p. 18 of the Transcript.

Before and at the time of this consolidation, a general statute of Illinois was in force authorizing consolidations of railroads in the State with those out of it, where their lines connected.

Section 1, Laws of Feb. 28, 1854.

Ill. Rev. Stat. 1868, p. 532.

By the 2d Section of said act the consolidated company had al the powers, franchises and immunities which the respective companies had by their respective charters before the consolidation.

By the 1st Section of the charter of the D. U. B. & P. road, it is empowered to contract, and to receive real or personal property needful to carry out and effect the purposes and objects of the act and by the 12th Section of the charter the appellant town is fully authorized to subscribe for its stock and in exchange give its bonds in aid of its construction.

The question arises then, are these powers carried into the consolidation upon a union of the two roads?

That the powers do survive and can still be exercised, we think, has been expressly, and repeatedly, decided.

The Supreme Court of Illinois early decided the principle here involved.

Robertson et al. vs. City of Rockford et al., 21 Ill., pp. 458 and 459.

In this case *the vote was to the consolidated* company, and under power contained in one of the constituent charters, as disclosed by the election notice set out on p. 454 of the report.

Furthermore, the opinion of the Court cites as authority, both for the consolidation and the vote after consolidation, this same Section 2 of the act of Feb. 28, 1854.

A precisely similar case to the one at bar was recently determined by the U. S. Circuit Court for the Eastern District of Arkansas.

Lewis vs. City of Clarendon, reported in the Central Law Journal of October 11, 1878, p. 287 and 289.

The statement of facts preceding the opinion, as also the opinion p. 258, disclose a case on all-fours with this one; and the Judge announces the principle which supports *a vote after consolidation*, as a settled one, that where two or more companies amalgamate or consolidate their respective roads under authority of law, the new or consolidated company succeeds to and possesses all the franchises, rights, privileges, and immunities of the several companies of which it was formed. He then cites in support of such principle,

Zimmer vs. State, 30 Ark. 677.

Robertson vs. Rockford, 21 Ill. 451.

Nugent vs. Supervisors, 19 Wall. 241, 242.

County of Scotlond vs. Thomas, 94 U. S. 682.

County of Henry vs. Nicoly, 95 U. S. 619.

If this Circuit Court decision is not authority, it at all events evi-

dences the understanding of the profession as to what the authorities are in a similar case.

But the principle of this case has moreover been several times expressly decided in favor of the exercise of such power, by *this* Court.

In the case of Scotland county vs. Thomas, 94 U. S. 682, the county subscribed to the capital stock of the *consolidated* company, and afterwards sought to evade its bonds upon the very pretence set up by appellant in this case, that whilst it was authorized to subscribe to the stock of the Alexandria & Bloomfield Railroad Co., it was not to the *Missouri, Iowa & Nebraska Railroad Co.*, the consolidation effected by an act of the legislature of Missouri. The Court hold that inasmuch as the State had reserved the right to amend the first charter, and did so by consolidating it with another road without changing the general direction of the road, the *power* of the county to subscribe to the consolidated road was not abrogated, but was a *right* and *privilege of the company*, and passed with its other rights and privileges into the new conditions of existence which it assumed under the consolidation.

Appellant claims in its brief that this case is not in point, because no vote of the people was required in Scotland county subscription, and because the case there turned upon a decision of the Supreme Court of Missouri.

What difference can it make in determining whether *power exists* to do a certain thing, whether the first step required in exercising the power, be a popular vote, or an order of a board of supervisors?

The quettion is, *whether after concolidation*, the *power* still remains to be exercised, *not how* it is to be exercised.

Our understanding is, that some other questions involved in the case were decided upon the authority of the State vs. Greon county, 54 Mo., but that *this* question was decided as well upon general authority.

On p. 693 the court say: "The case has other aspects necessary "to consider; if we look at the subject in a *broad* and *general* view "it will be still more manifest that the *power* in question was in- "tended to exist *notwithstanding the consolidation.*"

Then the court proceed to argue the question of the continued existence of this power to subscribe after consolidation upon general authority, and not upon the Greene Co. case in 54 Mo., or any other particular one, and cite as authorities supporting *the principle*

P., W. & B. R. R. Co. vs. Maryland, 10 How., 376.

Tomlinson vs. Branch, 15 Wall., 460.

Branch vs. Charlestown, 95 U. S., 677.

Upon the authority of this case, it follows that the power contained in the charter of the D., U., B. & P. Railroad to vote and subscribe aid *to its* construction, "was a *right and privilege of the company* which, upon its consolidation under the act of February 28, 1854, passed with its other rights and privileges into the new conditions of existence which it assumed under the consolidation."

The Greene county case in 54 Mo., *is itself* supported by a citation of the first two of the last mentioned authorities, to-wit: in 10 How and 15 Wall, and the dissenting opinion by Vories, J., argues against the majority opinion in trying to show that the doctrine of the U. S. Supreme Court upon the point was otherwise.

Appellant cites, and quotes from Burrough's on taxation, as announcing a different doctrine on this question.

Mr. Burroughs does announce the rule *as quoted*, but supports it alone upon the authority of

Harshman vs. Bates County, 2 Otto, and

Marsh vs. Fulton County, 10 Wall.

We submit his authorities do not support his rule. A deduction from the Harshman case, similar to Burrought' rule, was being contended for as governing the Scottland County case, but *this* court took occasion to explain in its opinion in the Scotland County case why a rule similar to Mr. Borroughs applied to the Harshman case and not to the other. The County Court in one case *was an agent* to subscribe *for a town*, and after the town had voted, but before the County Court exercised its agency by subscribing to the road voted aid, consolidated, which *revoked the agency*. It is clearly intimated that had the County been acting *for itself*, consolidation would not have taken away the power.

In the Fulton County case, 10 Wall, it was held an act of the legislature had created *three distinct roads* out of the *one* to which aid had been voted under authority, and that subscription *to one of the divisions* was not authorized by the vote to the original entire road.

The two foregoing cases are not analagous to the one at bar, nor to the Scotland Co. case, for if they were, then they both, as well as Burroughs would conflict with the doctrine of the Scotland county case. That *one* of the cases, to-wit, Harshman, with which Mr. Burroughs supports his ruse, *does not conflict with* the doctrine of the Scotland County case is expressly explained in the latter case, therefore Mr. Burroughs' rule is not supported by the Harshman case and is in direct conflict with the doctrine of the Scotland County case.

Burroughs on Taxation contains an addenda of cases appearing after his text was printed, in which he notices the Scotland County case, and says, the distinction made in it, between it and the Harshman case, "*is not at all satisfactory.*" p. 706.

He means not at all satisfactory *to him*, probably because if the cases were reconciled and the doctrine of the Scotland County case allowed to stand, it militated against *his rule*.

Unfortunately for Mr. Burroughs the doctrine and distinction of the Scotland county case has been *reiterated*, since his addenda, in

County of Henry vs. Nicolay, 95 U. S. 619, and
County of Schuyler vs. Thomas, 98 U. S. 169.

We think, then, both the *reasons* and the *authorities* given on p. 693 of 4 Otto, are against the position assumed by appellant, that consolidation divests towns of power to subscribe which they had under one of the constitutent charters.

We quote: "The project of the railroad promised a great pub-
"lic improvement, conducive to the interests of Alexandria and
"the counties through which it would pass. Its construction,
"however, would greatly depend upon the local aid and encour-
"agement it might receive. The interests of its projectors and of
"the country through which it was to traverse were regarded as
"mutual. The power of adjecent counties and towns to subscribe
"to its stock, as a means of securing its construction, was desired,
"not only by the company, but by the inhabitants. Whether the
"the policy was a wise one or not is not now the question. It
"was in accordance with the public sentiment of that period. The
"powers was sought at the hands of the Legislature, and was
"given. It was relied on by those who subscribed their private
"funds to the enterprise. It was involved in the general scheme

"as an integral part of it, and as much contributory and necessary "to its success as the prospective right to take tolls.

"Why it should not still attach to this portion of the road, as one "of the rights and privileges belonging to it, into whose hands so- "ever it comes, by consolidation or otherwise, it is difficult to see. "The principal laid down in the case of the Philadelphia, Wil- "mington & Baltimore Railroad Co. vs. Maryland, 10 How. 376, "and Tomlinson vs. Branch, 15 Wall., 460, and recently reaffirmed "in Branch vs. City of Charleston, 92 U. S. 577, seem to us di- "rectly applicable. Subscription to stock was not only a power of "county, but a privilege of the company—being a portion of the "the rights and privileges which it obtained by translation from "the charter of the North Missouri Railroad Company."

It is not shown that the route of the D. U B. & P. road was changed by its consolidation, the result being more beneficial to the town, as it gave them a continuous line of road, and thereby greater facilities for freight and travel than if they had voted their whole $75,000 to, and never had but the one short road to the State line.

A *subscription* is never released unless there has been a fundamental change not contemplated by a general or special law in existence at the time of subscription. Why then should *power* to subscribe aid, be lost by consolidation, which neither changes the route nor purpose? It is conceded, that if the town had voted the bonds, and subscribed them *before* the consolidation, the consolidated road would have been entitled to them, why? because it was supposed to be in the contemplation of the voters, when they voted he aid, that the roads might, under existing laws, consolidate be-

fore delivery of the bonds, and then the law entitled the consolidation to receive them.

What fundamental difference it can make to the town, in benefits and results, whether it votes aid to one road, and the *law* after consolidation delivers the bonds to another, or the town *itself both votes and delivers* the bonds to the consolidation. is more than we can discern. It would seem as if a case where the *law* transferred the bonds to the consolidated road after the vote was to a constituent road, was more of a hardship than where the town voluntarily did it.

The cases of Davenport vs. East Lincoln, and many others cited by appellant, we think not applicable to this controversy. The Court simply decided that where a vote was had under authority to one road, and a subscription made and their consolidation was effected under laws previously existing, that the consolidated road was entitled to the bonds. This falls short of deciding the point in controversy in this case, and does not militate against the position of appellee.

The case of Railroad Co. vs. Georgia, in 8 Otto, is not analagous as the Court there held, as they did in the Fulton county case, that that the intention and effect of the legislative act was to create an entirely new and different corporation.

We think there is no force in appellant's point that the *first vote exhausted the power.*

The town was authorized to subscribe $250,000.

The Supreme court of Illinois in the case of Wanesville vs. Illinois Midland R. R. Co., 88 Ill., 469, hold that successive elections may be held until the whole amount is subscribed.

Appellee preserved exceptions to certain findings and evidence

offered by appellant for the reason merely that he did not regard the same admissible against a *bona fide* holder of bonds that did not disclose on their face notice to him of such defences.

One of these cases was first tried by their Honors J. J. Drummond and Treat, and judgment for appellee.

Page 4 of Transcript.

Appellant, so desiring it, had a reargument of the case afterwards, when it was consolidated with the subsequent suit, and judgment again for appellee, before Judge Treat.

Page — of Transcript.

The case now comes before this Court with an assignment, by appellant, of two errors, (p. 4 of Brief,) one, that the *first vote* exhausted the *power;* and secondly, that the power to vote aid did not survive the consolidation.

We submit that both authority and reason are against these positions of appellant.

The case is submitted under Rule XX, by stipulation in the record.

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Respectfully submitted,

S. M. CULLOM,

Counsel for Appellee.